85-832

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

OLYMPIC SPORTS PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in holding a state law which mandates that an action be dismissed if not brought to trial within a specified period of time is inapplicable in federal courts even though jurisdiction is based solely upon diversity of citizenship.

2. Whether the court below erred in failing to adopt California's construction of its mandatory dismissal law for failure to bring a case to trial within a specified period of time as "mandatory."

3. Whether the *de novo* standard of review utilized by the court below to review the district court's construction of state law conflicts with the standard of review utilized by all other circuit courts of appeals.

DESIGNATION OF CORPORATE RELATIONSHIPS

Whittaker Corporation, filing this petition for certiorari as petitioner in this proceeding, states that:

1. This is its original Designation of Corporation Relationships;

2. Whittaker Corporation is not owned by any parent corporation;

3. Whittaker Corporation does not have any subsidiaries which are not wholly owned; and

4. Whittaker Corporation does not have any affiliates.

PARTIES

Three separate corporations were parties in the court below. Plaintiff and respondent herein, Olympic Sports Products, Inc. ("Olympic"), a Florida Corporation, Defendant and petitioner herein, Whittaker Corporation ("Whittaker"), a California corporation, and a co-defendant and counter-claimant herein, Universal Gym

Equipment, Inc. ("UGE"), a California corporation. UGE's counterclaim is only against Olympic.[1]

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[1]On September 28, the district court, on its own motion, dismissed UGE's counterclaim pursuant to California Code of Civil Procedure Section 583(b). UGE successfully appealed that ruling. Accordingly, Whittaker is not sure what position, if any, UGE will take with respect to this petition.

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, reported at 760 F.2d 910 (9th Cir. 1985), appears in the appendix hereto as Appendix A. The order of the Court of Appeals for the Ninth Circuit denying Whittaker's petition for rehearing appears in the appendix hereto as Appendix B. The decision of the District Court for the Central District of California, not reported, appears in the appendix hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 22, 1985. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 16, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 41(b), Federal Rules of Civil Procedure:

> "(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Section 583(b), California Code of Civil Procedure provides:[2]

> "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended."

STATEMENT OF THE CASE

Olympic was a distributor for Whittaker's Universal Athletic Sales Division from 1968 to 1975, and for UGE in 1975 and 1976, Whittaker having sold the assets of its Universal Athletic Sales Division to UGE on January 31, 1975. Pursuant to the written distribution agreements involved, California law governs any disputes between the parties.

The gravamen of Olympic's suit against both Whittaker and UGE is its claim of being overcharged by Whittaker and UGE for freight for shipments by those companies of Universal athletic equipment to Olympic. Both Whittaker and UGE deny that there were any improper freight charges to Olympic. UGE's counterclaim against Olympic is for money allegedly owing by Olympic to UGE.

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[2]Section 583(b) was recently repealed and reenacted without substantive change as Section 583.310 of the California Code of Civil Procedure. This repeal and reenactment was a part of an overall revision of California's law on dismissal for failure to prosecute. The instant matter is governed by former Section 583(b).

Olympic's suit was filed on March 1, 1978. A first amended complaint was filed on May 2, 1978. Whittaker answered the first amended complaint on July 14, 1978. On July 21, 1978, UGE filed its answer to the first amended complaint as well as its counterclaim.

On November 13, 1979, and November 14, 1979, all parties filed respective pretrial conference pleadings. At that time Olympic stated:

> "B. EXPERT WITNESSES
>
> 1. Plaintiff anticipates calling one or two expert witnesses. At this time, Olympic has not been able to specifically identify said experts, but will make every diligent effort to do so as soon as possible. Said witnesses will be called to testify as to common carrier industry freight rates, and will compare such freight rates to the freight rates schedules issued by Defendants."

In January, 1980, before any pretrial conference was held, all parties filed respective motions for summary judgment. Whittaker also filed a motion for leave to amend its answer and to file a counterclaim against Olympic. The substance of Whittaker's counterclaim is that if Olympic recovers anything from Whittaker on a freight rate overcharge theory, Olympic would have to give that recovery back to Whittaker on a *quantum meruit* theory for Whittaker's freight related work which was otherwise included in its freight charges.

On February 11, 1980, the district court heard all of the above motions and took them under submission. Nothing further occurred with respect to a pretrial conference.

On December 8, 1980, the district court denied all of the respective motions for summary judgment, but

granted Whittaker's motion for leave to file its amended answer and counterclaim.

Subsequent to December 8, 1980, nothing further occurred until April 22, 1982, when UGE filed a motion requesting a pretrial conference. On May 7, 1982, Whittaker filed its opposition to UGE's motion and requested that Olympic's suit be dismissed pursuant to Rule 41(b), Federal Rules of Civil Procedure. Thereafter, on May 13, 1982, Olympic filed a joinder in UGE's pretrial conference motion.

On May 17, 1982, the district court held an initial hearing on UGE's pretrial conference motion and Whittaker's Rule 41(b) motion. At that time Olympic first disclosed that it had an expert and that a report was forthcoming. Because of that representation the district court continued the motions to June 14, 1982. They were subsequently continued to June 21, 1982.

On June 21, 1982, the district court heard both UGE's pretrial conference motion and Whittaker's Rule 41(b) motion. The district court denied Whittaker's Rule 41(b) motion to dismiss without prejudice and stated that "there may be a time when I think that could be renewed . . ." UGE's pretrial conference motion was also denied without prejudice because Olympic's expert had still not furnished his report. Nothing further was scheduled by the district court. Responsibility for securing the expert's report and deciding what next to do was left with the parties.

No further pleadings were filed until May 3, 1983, when Olympic filed a motion requesting a pretrial conference. On May 27, 1983, Whittaker filed opposition to Olympic's motion and also filed a motion to dismiss pursuant to California Code of Civil Procedure Section 583(b) or Rule 41(b), Federal Rules of Civil Procedure.

On June 20, 1983, the district court tentatively granted Whittaker's motion to dismiss on the basis of California Code of Civil Procedure Section 583(b). An order so granting Whittaker's motion was filed on September 14, 1983. Judgment was entered on September 30, 1983.

The district court's decision was subsequently reversed by the court below on the ground that California Code of Civil Procedure Section 583(b) was "discretionary" and, therefore, in accordance with the analysis outlined in *Hanna v. Plumer,* 380 U.S. 460 [85 S.Ct. 1136, 14 L.Ed.2d 8] (1965), Rule 41(b) of the Federal Rules of Civil Procedure had to govern.

The dissent by Circuit Judge Wallace argued that the majority had incorrectly interpreted California law as to the nature of Section 583(b), that Section 583(b) was not "discretionary" in the sense of Rule 41(b), and, therefore, the analysis of direct conflict outlined in *Walker v. Armco Steel Corp.,* 446 U.S. 740 [100 S.Ct. 1978, 64 L.Ed.2d 613] (1980) had to apply. Under that analysis the decision of the district court should have been affirmed.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Central District of California had jurisdiction over this matter on the basis of diversity of citizenship under 28 U.S.C. Section 1332(a).

REASONS FOR GRANTING THE WRIT

Whittaker's petition should be granted pursuant to Rule 17.1(c), Supreme Court Rules. The question of the applicability in diversity jurisdiction cases of state mandatory dismissal laws for failure to prosecute[3] is

[3]At present a number of states have mandatory dismissal laws for failure to bring a case to trial within a specified period of time. See Appendix D.

an important question of federal law which has not been decided by this Court. In addition, the decision of the Court of Appeals for the Ninth Circuit conflicts with reasoning of other analogous decisions of this Court.

As a further basis for granting this petition Whittaker submits that the majority's analysis of California's mandatory dismissal law as "discretionary" so far departs from accepted and usual course of judicial proceedings in two respects, namely deference by federal courts to state construction of its own laws and utilization of *de novo* appellate review contrary to the standard of review of all other circuit courts of appeals, that Rule 17.1(a), Supreme Court Rules, also becomes applicable.

I.

WHETHER A STATE LAW WHICH MANDATES THAT A CASE BE DISMISSED IF NOT BROUGHT TO TRIAL WITHIN A SPECIFIED PERIOD OF TIME MUST APPLY IN A DIVERSITY CASE IS AN IMPORTANT QUESTION OF FEDERAL LAW NOT HERETOFORE ADDRESSED BY THIS COURT

Ever since *Erie R. Co. v. Tompkins,* 304 U.S. 64 [58 S.Ct. 817, 82 L.Ed. 1188] (1938) the Court has periodically been requested to decide whether a given state law had to be applied in a federal court suit based upon diversity of citizenship. This petition involves another such request, namely, whether a state law which mandates that suit be dismissed if not brought to trial within a specified period of time after commencement must be so applied. That precise question has never been addressed by this Court.

To date, the only reported opinions by federal courts of appeals on this precise issue have produced less than unanimity. In the instant matter the Court of Appeals

for the Ninth Circuit divided 2 to 1 on the issue. In *Lumbermen's Mutual Casualty Company v. Wright,* 322 F.2d 759 (5th Cir. 1963) the Court of Appeals for the Fifth Circuit divided 3 to 2 on the issue.[4]

A review of post *Erie* Supreme Court decisions on related issues, however, mandates that unless the state law in question directly conflicts with federal law it must be applied in a diversity jurisdiction suit.

Walker v. Armco Steel Corporation, 446 U.S. 740 [100 S.Ct. 1978, 64 L.Ed.2d 659] (1980) represents the Court's most recent decision on the general issue of state law applicability in diversity jurisdiction litigation. *Walker* involved the question of whether an Oklahoma statute which required actual service of the complaint in order to toll the state statute of limitations, or Rule 3 of the Federal Rules of Civil Procedure which states that a civil action is commenced by filing the complaint, governed in a diversity case. In holding that the federal court must follow Oklahoma law the Court stated:

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[4]*Lumbermen's Mutual* held that the law of the case doctrine compelled the court to adopt an earlier decision in the same case which reversed the trial court's dismissal of a suit pursuant to Louisiana's five-year rule. That earlier decision was *Wright v. Lumbermen's Mutual Casualty Company,* 242 F.2d 1 (5th Cir. 1957).

The earlier *Wright* decision is of dubious precedent. To begin with it predates *Walker v. Armco Steel Corporation,* 446 U.S. 740 [100 S.Ct. 1978, 64 L.Ed.2d 659] (1980). Additionally, and of even more significance, is the fact that the court in the subsequent *Lumbermen's Mutual* opinion openly questioned the correctness of the earlier *Wright* decision.

Wright was decided in 1957 by a panel comprised of Judges Borah, Tuttle and Cameron. The 1963 *Lumbermen's Mutual* decision was decided by a panel composed of Judges Tuttle, Rives and Wisdom. In that decision two members of the court "expressed doubts as to the correctness of the court's decision on the first appeal." (322 F.2d at 760). However, the law of the case doctrine was applied.

"This question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years. In the landmark decision of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we overturned the rule expressed in *Swift v. Tyson,* 16 Pet. 1, 10 L.Ed. 865 (1842), that federal courts exercising diversity jurisdiction need not, in matters of 'general jurisprudence,' apply the nonstatutory law of the state. The court noted that '[d]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state,' *Erie R. Co. v. Tompkins, supra,* 304 U.S., at 74, 58 S.Ct., at 820-821. In response, we established the rule that '[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the state,' *id.* at 78, 58 S.Ct., at 822.

"In *Guaranty Trust Co. v. York,* 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), we addressed ourselves to 'the narrow question whether, when no recovery could be had in a state court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties,' *id.* at 107, 65 S.Ct., at 1469. The Court held that the *Erie* doctrine applied to suits in equity as well as to actions at law. In construing *Erie* we noted that '[i]n essence, the intent of

> that decision was to insure that, *in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determined the outcome of a litigation, as it would be if tried in a state court.*' 326 U.S., at 109, 65 S.Ct., at 1470. We concluded that the state statute of limitations should be applied. 'Plainly enough, a statute that would completely bar recovery in a suit if brought in a state court bears on a state-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow state law.' *Id.*, at 110, 65 S.Ct. at 1470."

Id. at 744-745. (Emphasis added.)

Subsequent to *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 [65 S.Ct. 1464, 89 L.Ed. 2079] (1945), the Court held in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 [69 S.Ct. 1233, 93 L.Ed. 1500] (1949) that a Kansas statute requiring actual service of the summons for a suit to be deemed commenced within the meaning of the statute of limitations was controlling in a federal court diversity suit over Rule 3 of the Federal Rules of Civil Procedure. In so holding, the Court stated:

> ". . . But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden

and is subject to the same defenses in the federal court as in the state court. *See Cities Service Co. v. Dunlap,* 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196; *Palmer v. Hoffman,* 318 U.S. 109, 117, 63 S.Ct. 477, 482, 87 L.Ed. 645, 144 A.L.R. 719. It accrues *and comes to an end when local law so declares. West v. American Tel. & T. Co.,* 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956; *Guaranty Trust Co. v. York, supra.* Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.

> *"We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court.* In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. *We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action.* We may not do that consistently with *Erie R. Co. v. Tompkins."*

Id. at 532-534. (Emphasis added.)

Walker is indistinguishable from *Ragan.* It arose because of arguable confusion created by the Court's decision in *Hanna v. Plumer,* 380 U.S. 460 [85 S.Ct. 1136, 14 L.Ed.2d 8] (1965) which held that Rule 4(d)(1) of the Federal Rules of Civil Procedure dealing with the manner in which process was served governed over

state law in a diversity suit. *Walker* reconciled *Ragan* and *Hanna* as follows:

> "This court in *Hanna* distinguished *Ragan* rather than overruled it, and for good reason. Application of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law. 380 U.S., at 472, 85 S.Ct., at 1143. In *Hanna* itself the 'clash' between Rule 4(d)(1) and the state in-hand service requirement was 'unavoidable.' 380 U.S., at 470, 85 S.Ct., at 1143. The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the court. It is only if that question is answered affirmatively that the *Hanna* analysis applies."

Id., 446 U.S. at 749-750.

> "Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply. Instead, the policies behind *Erie* and *Ragan* control the issue whether, *in the absence of a federal rule directly on point,* state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in federal court under diversity jurisdiction. The reasons for the application of such a state service requirement in a diversity action in the absence of a conflicting federal rule are well explained in *Erie* and *Ragan, see supra,* at 1982-1983, and need not be repeated here. It is sufficient to note that although in this case failure to apply the state service law might not create any

> problem of forum shopping, the result would be an 'inequitable administration' of the law. *Hanna v. Plumer*, 380 U.S., at 468, 85 S.Ct., at 1142. *There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diveristy of citizenship between the litigants.* The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it."

Id., 446 U.S. at 752-753. (Emphasis added.)

In the instant suit there is no federal rule which directly controls the present issue. Rule 41(b) confers *discretionary* power to dismiss a suit for a plaintiff's failure to prosecute. It says nothing, however, as to when a suit is subject to *mandatory* dismissal for a plaintiff's failure to prosecute.

Since this issue is of importance to the parties herein as well as to litigants in California and other states with similar laws, and since the issue to date has produced less than unanimity at the court of appeals level, the issue does raise an important question of federal law not heretofore addressed by this Court.

II.

THE MAJORITY DECISION IN THE COURT BELOW FAILED TO FOLLOW CALIFORNIA'S CONSTRUCTION OF ITS MANDATORY DISMISSAL LAW AS "MANDATORY"

Federal courts are bound to accept interpretations or constructions of state law by the highest court of the

state *Hortonville J.S.D. No. 1 v. Hortonville Ed.*, 426 U.S. 482, 488 [96 S.Ct. 2308, 2312, 49 L.Ed. 2d 1] (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 442 [92 S.Ct. 1029, 1032, 31 L.Ed.2d 349] (1972). In addition, intermediate appellate state court decisions defining state law are not to be disregarded unless the federal court is convinced by other persuasive data that the highest court of the state would decide otherwise. *C.I.R. v. Estate of Bosch*, 387 U.S. 456, 465 [87 S.Ct. 1776, 1782, 18 L.Ed.2d 886] (1967).

California, since 1905,[5] has had and still has two distinct types of legislation authorizing a court to dismiss an action for failure to prosecute. One is "discretionary" and found in former Section 583(a), Code of Civil Procedure, now Section 583.410(a), Code of Civil Procedure; the other is "mandatory" and found in former Section 583(b), Code of Civil Procedure, now Section 583.310, Code of Civil Procedure. The Federal Rules of Civil Procedure, on the other hand, contain only a "discretionary" dismissal provision, Rule 41(b).

Despite this clear structuring of California and federal law, the majority concluded that Section 583(b) is "discretionary" because of judicial exceptions based upon concepts of "impossibility, impracticability or futility." These judicial exceptions have now been codified in Section 583.340(c), Code of Civil Procedure.

It must be noted that even with the new California legislation which codifies these judicially created exceptions, California still enacted two separate and distinct provisions to govern dismissals for failure to prosecute, one discretionary, the other mandatory.[6]

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[5]See legislative history of former Section 583 in West's Ann. C.C.P. Section 583, at 231-232 (1976).

[6]Article 3, Sections 583.310-583.360 of the Code of Civil Procedure is entitled "Mandatory time for Bringing Action to Trial

Indeed, it would make no sense for California to have two separate discretionary dismissal statutes.

As for Section 583(b), in *Crown Coach v. Sup. Ct.*, 8 Cal.3d 540, 546 [105 Cal.Rptr. 339] (1972) the California Supreme Court equated Section 583(b) to statutes of limitation, stating:

> "The dismissal statutes, like statutes of limitation, 'promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed. The statutes also protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.' *General Motors Corp. v. Sup. Ct.* (1966) 65 Cal.2d 88, 91; [52 Cal.Rptr. 460, 416 P.2d 492].) Thus in applying the mandatory five-year provision of section 583 we have said that '[u]nless an action is brought to trial within five years after it has been filed, except where the parties stipulate in writing that the time may be extended or in certain cases where the defendant is absent from the state, the action must be dismissed upon motion of the defendant. [Citations.]' (*Tunis v. Sup. Ct.* (1963) 59 Cal.2d 465, 466; 30 Cal.Rptr. 135, 380 P.2d 823; *see Pacific Greyhound Lines v. Sup. Ct.* (1946) 28 Cal.2d 61, 63; 168 P.2d 665; *Christin v. Sup. Ct.* (1937) 9 Cal.2d 526, 529; 71 P.2d 205, 112 A.L.R. 1153; *Miller & Lux Inc. v. Sup. Ct.* (1923) 192 Cal. 333, 338; 219 P. 1006; *Anderson v. Sup. Ct.* (1921) 187 Cal. 95, 97; 200 P.963.)."

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or New Trial." Article 4, Sections 583.410-583.430 of the Code of Civil Procedure is entitled "Discretionary Dismissal for Delay."

In accordance with *Crown Coach*, and subsequent to the decision in the court below, a number of decisions have been rendered by the California Court of Appeal which further demonstrate that Section 583(b) is "mandatory" and not akin to Rule 41(b) of the Federal Rules of Civil Procedure.

In *Campanella v. Takaoka*, 160 Cal.App.3d 504, 513 [206 Cal.Rptr. 745] (1984), the court pointed out the differences between former Section 583(a) and Section 583(b) of the Code of Civil Procedure as follows:

> "Under section 583, subdivision (a), the trial court must consider a myriad of facts (see Cal. Rules of Court, rule 373(e), formerly rule 203.5(3)) not limited to the reasonableness of the plaintiff's conduct before exercising its discretionary power to dismiss. The burden is on the defendant to show that dismissal is warranted (*Hocharian v. Superior court* (1981) 28 Cal.d 714, 723, fn.7 [170 Cal.Rptr. 790, 621 P.2d 829]; See also *Visco v. Abatti* (1983) 144 Cal.App.3d 904, 9070909 [192 Cal.Rptr. 833]; *Tannatt v. Joblin* (1982) 130 Cal.App.3d 163, 1068 [182 Cal.Rptr. 112].) More importantly, in operating under the canopy of section 583, subdivision (a), the trial court is required to consider whether the interests of justice are best served by dismissal, trial of the case or imposing conditions on its dismissal or trial. (See *Lopez v. Larson* (1979) 91 Cal.App.3d 383, 407-408 [153 Cal.Rptr. 912].) In contrast, however, under section 583, subdivision (b), '[t]he burden is on plaintiffs to first establish in the trial court, by clear and convincing proof, the existence of either impossibility, impracticability or futility of bringing the matter to trial within

> five years. Absent such a showing, the five-year statutes applies without any further consideration or determination of prejudice.' (*Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc., supra,* 143 Cal.App.3d at p. 796.)"

Accord: *Hoffman v. State of California,* 171 Cal.App.3d 1100, 1108-1109 [___ Cal.Rptr. ___] (1985).

Given the fact that Rule 41(b), Federal Rules of Civil Procedure, like Section 583(a), California Code of Civil Procedure, places the burden on the defendant to show that a dismissal is warranted, Rule 41(b) is obviously akin to Section 583(a), not Section 583(b).

See also, LeMaise, Founce & Katznelson v. Cox, 171 Cal.App.3d 297, 301 [___ Cal.Rptr. ___] (1985) ("Enactment of section 583 constituted legislative determination that a five-year delay was unreasonable as a matter of law."); *Varwig v. Leider,* 171 Cal.App.3d 312, 314 [___Cal.Rptr. ___] (1985) ("The trial court as a rule has a mandatory duty to dismiss an action not brought to trial within five years."); and, *Hendrix v. Hendrix,* 171 Cal.App.3d 849, 862 [___ Cal.Rptr. ___] (1985) ("Section 583 subdivision (b) mandates dismissal by the court of an action that has not been brought to trial within five years after the date of filing.")

In sum, there is no support in California law for the majority's argument that because policy considerations such as impossibility, impracticability or futility exist, a statute requiring action within a specified period of time somehow becomes "discretionary." Statutes of limitations have long had judicially created exceptions applied to them. *See e.g., Dew v. Appleberry,* 23 Cal.3d 630 [153 Cal.Rptr. 219] (1979) (statute of limitations is tolled during defendant's absence from state); *April*

Enterprises, Inc. v. KTTV, 147 Cal.App.3d 805 [195 Cal.Rptr. 421] (1983) (cause of action for breach of contract does not accrue until plaintiff discovers or should have discovered all facts essential to his cause of action). Those exceptions, however, do not make such statutes any less of a statute of limitations than do limited exceptions to Section 583(b) make it any less of a mandatory dismissal provision.

III.

THE NINTH CIRCUIT COURT OF APPEALS' *DE NOVO* STANDARD OF REVIEW OF THE DISTRICT COURT'S CONSTRUCTION OF STATE LAW WAS CLEARLY ERRONEOUS AND CONFLICTS WITH THE STANDARD OF REVIEW UTILIZED BY ALL OTHER CIRCUIT COURTS OF APPEAL

Whittaker is aware of the general policy of the Court not to review interpretations of state law made by federal courts of appeals. *Butner v. United States,* 440 U.S. 48, 58 [99 S.Ct. 914, 919, 59 L.Ed.2d 136] (1979); *Bishop v. Wood,* 426 U.S. 341, 346, and n.10 [96 S.Ct. 2074, and n.10. 48 L.Ed.2d 684] (1976). However, that general policy is not mandatory for all situations. Thus, the Court has stated that a court of appeals decision which is "clearly wrong," *The M/V "Tungus" v. Skovgaard,* 358 U.S. 588, 597 [79 S.Ct. 503, 509, 3 L.Ed.2d 524] (1959) or shown to be "unreasonable," *Propper v. Clark,* 337 U.S. 472, 486-487 [69 S.Ct. 1333, 1341-1342, 93 L.Ed. 1980] (1949) will warrant review. So too will a showing that the court of appeal "erred." *Hillsborough TP v. Cromwell,* 326 U.S. 620, 629 [66 S.Ct. 445, 451, 900 L.Ed. 358] (1946). Indeed the Court has, in fact, reversed the court of appeals when it concluded that the court of appeals' analysis of state law was in error. *Steele*

v. General Mills, 329 U.S. 433, 440-441 [67 S.Ct. 439, 443, 91 L.Ed. 402] (1947).

In this matter, the interpretation of Section 583(b) of the California Code of Civil Procedure adopted by the two judge majority, neither of whom is based in California (Circuit Judge Boochever, Alaska and District Judge Jameson, Montana) is clearly wrong, unreasonable and erroneous. Both District Judge Stephens and Circuit Judge Wallace, who are based in California, correctly construed applicable California law.

In *Huddleston v. Dwyer,* 322 U.S. 232, 237 [64 S.Ct. 1015, 1018, 88 L.Ed. 1246] (1944) the Court observed that the significance of aid in the interpretation of state law provided by judges of lower federal courts "who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions." Bearing that in mind, and with all due respect to Judges Boochever and Jameson, Whittaker respectfully suggests that the analysis provided by the two California federal Judges, who are familiar with the intracacies and trends of California law, should be determinative in this matter.

Additionally, but for the Ninth Circuit Court of Appeals recently adopted unique rule whereby it can undertake a *de novo* review of a district court's construction of state law, the construction adopted by the district court in this matter would have been accorded "great weight" or "substantial deference." *See e.g.,* appendix cited by the dissent in *Matter of McLinn,* 739 F.2d 1395, 1407-1412 (9th Cir. 1984). This is especially significant in light of the fact that the majority opinion is authored by two non-California judges.

Since the Ninth Circuit *de novo* review procedure of district court construction of state law, adopted in *Matter of McLinn, supra,* at 1397, results from an *en banc* decision which had a seven member majority and a five member dissent, and since that *de novo* review approach is contrary to all other circuit courts of appeals, the Court should eliminate this current conflict over the appropriate standard of review by rejecting the Ninth Circuit's position.

It is also noted that if the Court rejects the Ninth Circuit *de novo* standard of review, and accords the construction of California law adopted by the district court the "great weight" and "substantial deference" all other circuit courts of appeals would give that construction, there would be no need for the Court to "review" the construction of California law enunciated by the court below. In other words, the correct result can be achieved by the Court without truly having to depart from its general policy of not reviewing construction of state law made by federal courts of appeals.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OLYMPIC SPORTS PRODUCTS, INC.,
Plaintiff/Appellant,

v.

UNIVERSAL ATHLETIC SALES CO.,
Universal Gym Equipment Co., etc.,
et al., Defendants/Appellees.

UNIVERSAL GYM EQUIPMENT, INC.,
Counterclaimant/Appellant,

v.

OLYMPIC SPORTS PRODUCTS, INC.,
Counterdefendant/Appellee.

Nos. 83-6332, 84-5736.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 7, 1984.
Decided April 22, 1985.

On appeal from the United States District Court for the Central District of California.

Before WALLACE and BOOCHEVER, Circuit Judges, and JAMESON,* District Judge.

* Honorable William J. Jameson, Senior United States District for the District of Montana, sitting by designation.

BOOCHEVER, Circuit Judge:

Olympic Sports Products, Inc. (Olympic) appeals the dismissal of its claim by the district court for lack of prosecution under section 583(b) of the California Code of Civil Procedure (Deering 1972). Olympic claims that Fed.R.Civ.P. 41(b) governed dismissal and that section 583(b) was therefore inapplicable. Universal Gym Equipment, Inc. (Universal) appeals the district court's dismissal of its counterclaim on the same ground. Olympic and Universal further assert that if section 583(b) did govern dismissal the court's determination that their claims warranted dismissal constituted an abuse of discretion.

We hold that federal rule 41(b) governs the question of dismissal and that the district court erred in applying the state statute instead of the federal rule. Because section 583(b) was not applicable we need not address whether dismissal of Olympic's claim and Universal's counterclaim under that statute was erroneous.

FACTS

On March 1, 1978, Olympic, appellant/counter-appellee, a distributor of athletic equipment for appellee Whittaker and appellee/counter-appellant Universal, filed a diversity action in district court against Whittaker and Universal alleging breach of contract and fraud. Olympic alleged that appellees were secretly profiting by overstating freight charges on athletic equipment. Universal counterclaimed for contract damages on the ground that Olympic owed it money for goods purchased. The prolonged procedural history of this case is summarized in Appendix A.

On March 1, 1983, the complaint had been filed for five years. Olympic and Universal moved for a pretrial

conference on May 5, 1983. Whittaker opposed the motion and on May 27, 1983, moved to dismiss the action pursuant to California Code of Civil Procedure section 583(b) and rule 41(b) of the Federal Rules of Civil Procedure.

Hearing on the motions was, at Whittaker's request, continued to June 20, 1983, at which time the court tentatively ruled that the case be dismissed pursuant to section 583(b), but took the matter under submission. On September 14, 1983, the court issued its order of dismissal. Two weeks later it dismissed the counterclaim on the same ground.

Olympic appealed, and Universal filed a separate counterappeal. The cases were consolidated for argument in this court.

Olympic and Universal contend that Fed.R.Civ.P. 41(b), rather than section 583(b) of the California Code of Civil Procedure, governs dismissal of diversity suits for lack of prosecution, and that the district court erred by applying section 583(b). Although Universal is an appellee with Whittaker in the appeal brought by Olympic, it is not opposing Olympic's arguments on appeal.

Whittaker asserts that rule 41(b) and section 583(b) differ in that rule 41(b) governs discretionary dismissal and section 583(b) governs mandatory dismissal. Whittaker concludes that because the federal rule does not address mandatory dismissal, *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), requires us to apply California law. Whittaker further argues that section 583(b), because it is mandatory, is a statute of limitations, and that Supreme Court precedent mandates the application of state statutes of limitations in diversity suits.

DISCUSSION

A. Standard of Review

Whether state or federal law applies in a diversity action is a question of law, *see Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 579-80 (9th Cir. 1981), which we review de novo, *Miller v. United States*, 587 F.2d 991, 994 (9th Cir. 1978). Our de novo review extends to the district court's construction of state law. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir.1984) (en banc) (overruling prior practice of deferring to district court's interpretation of the law of the state in which it sits). Although we are not bound by the district court's construction of state law, we are bound to follow the decisions of a state's highest court in interpreting that state's law. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 904 (9th Cir.1983).

B. The Erie and Hanna Analyses

We note at the outset that this court has already considered whether *Erie* requires federal courts to enforce section 583(b) in diversity suits. In *Nealey v. Transportation Maritime Mexicana, S.A.*, 662 F.2d 1275, 1278 n. 5 (9th Cir.1980), we stated that rule 41(b), not section 583(b), governed dismissal for lack of prosecution in diversity suits. At oral argument of *Nealey*, however, the party opposing the enforcement of federal law conceded its applicability; the court's statement is dicta. We therefore proceed to analyze whether the federal rule or a state law governs dismissal here.

In 1938, the Supreme Court departed from precedent to rule that except in matters governed by the United States Constitution or acts of Congress, federal courts must apply state law in diversity suits. *Erie*, 304 U.S.

at 78, 58 S.Ct. at 822 (construing The Federal Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (Rules of Decision Act) (current version at 28 U.S.C. § 1652 (1982))). The Rules of Decision Act then provided that the "laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Prior to *Erie*, the Court had interpreted the Act as requiring federal court application only of state statutes and local decisions concerning real property, not of state decisional law. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18, 10 L.Ed. 865 (1842). Under the *Swift* doctrine, federal courts assumed the power of diversity suits to decide issues of common law, such as tort principles or the interpretation of contracts. *See Erie*, 304 U.S. at 71, 74-76, 58 S.Ct. at 818, 820-822.

Erie repudiated this doctrine and held that state decisional law is entitled to respect equal to that accorded to state statutes. *Id.* at 78-79, 58 S.Ct. at 822-823. Neither Congress nor the federal judiciary has the constitutional power to declare substantive rules of common law for the states. *Id.* at 78, 58 S.Ct. at 822. Thus any application of the Rules of Decision Act which invades that substantive province must be unconstitutional. *Id.* at 79-80, 58 S.Ct. at 822-823. Underlying the Court's decision was its recognition that if the plaintiff, by choosing a federal rather than state forum, could also choose to have federal law rather than state law apply, injustice and confusion would result. *Id.* at 74-77, 58 S.Ct. at 820-822.

The Court subsequently indicated that the choice of law cannot be resolved simply by labeling a question substantive or procedural. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-10, 65 S.Ct. 1464, 1469-70, 89 L.Ed.

2079 (1945). According to *York*, the core policy of *Erie* is that plaintiff should not be able to choose a different outcome for a lawsuit by filing in federal court rather than state court. Under this outcome-determination test, *York* held that a state statute of limitations controlled in a diversity suit based on a state-created right. If the suit would be barred in state court when filed, it must be barred in federal court. Statutes of limitations, which dictate the life of state causes of action, are too intimately connected with the substance of the state-created right to be disregarded by the federal courts. *Id.* at 109-10, 65 S.Ct. at 1469-70.

The Court reiterated its respect for state statutes of limitations in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949). The federal rules of procedure tolled the statute of limitations upon filing of the complaint; the applicable state rule tolled the statute upon service. Because the state itself treated the service rule as an integral part of its statute of limitations, *Ragan* held that the state tolling rule must control. *Id.* at 532-34, 69 S.Ct. at 1234-35.

Erie and its progeny, however, are only one of two lines of cases governing choice of law in diversity suits. In *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the Court traced the development of a parallel series of precedents exemplified by *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941), and explained when each line controls. The *Erie* analysis, based upon the Rules of Decision Act, applies when no federal rule directly addresses the situation. *Hanna*, 380 U.S. at 469-71, 85 S.Ct. at 1142-44. If both a state rule and a federal rule cover the situation, *Hanna* calls for a different analysis, based on the Rules Enabling Act, 28 U.S.C. § 2072 (1982).

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna, 380 U.S. at 471, 85 S.Ct. at 1144.

The Rules Enabling Act authorizes the Supreme Court to prescribe procedural rules for the federal judiciary. The Act was passed pursuant to Congress' constitutional power to establish a federal court system. *See* U.S. Const. art. III, § 1. The power to establish a court system necessarily encompasses the power, which Congress has delegated to the Supreme Court, to prescribe housekeeping rules for that system. *Hanna*, 380 U.S. at 472, 85 S.Ct. at 1144. The Enabling Act does contain a self-limiting clause: the rules of procedure "shall not abridge, enlarge or modify any substantive right." Therefore the test for the validity of a federal rule of procedure is whether the rule regulates "judicial process for enforcing rights and duties recognized by substantive law." *Sibbach*, 312 U.S. at 14, 61 S.Ct. at 426 (quoted in *Hanna*, 380 U.S. at 464, 85 S.Ct. at 1140).

A court should not ignore *Erie* principles when testing a federal rule under *Hanna*. *Hanna*, 380 U.S. at 473, 85 S.Ct. at 1145; *see also* Ely, *The Irrepressible Myth of Erie*, 87 Harv.L.Rev. 693, 720-23 (1974) (suggesting that this second analytical step, which the *Hanna* Court derives from *Erie* and other decisions based on the Rules of Decision Act, would more properly be based on the Rules Enabling Act provision that "[s]uch rules shall not abridge, enlarge or modify any substantive right").

In analyzing the clash between a state and a federal rule under *Erie* and *York*, however, a court should note that every procedural rule may, at some point in litigation, be outcome-determinative, for the failure to follow a court's procedural rules may result in the dismissal of a claim, defense, or entire lawsuit. *See Hanna*, 380 U.S. at 468-69, 85 S.Ct. at 1142-43. Therefore, the court should not blindly follow *York* and ask if application of the federal rule will determine the outcome of the controversy. Rather, the court should look at the rule in light of the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468, 85 S.Ct. at 1142 The proper query is whether the difference between the two rules would be relevant to plaintiff's initial choice of a forum. *See id.* at 469, 85 S.Ct. at 1142.

Our analysis therefore must have several steps. First, we must determine if the federal rule and state rule are actually coextensive. If the federal rules does not address the situation, there would be no conflict between state and federal rules. We would then apply the *Erie* analysis to determine if the federal court should enforce the state rule. If the federal rule does address the situation, there would be an unavoidable conflict between the state and federal rules. We would then apply the *Hanna* analysis: if the federal rule is within the scope of constitutional power and the Rules Enabling Act, it applies unless the *Erie* considerations are so strong that they can justify interrupting the normal function of the federal court processes. *See* Ely, *supra*, at 720 (characterizing *Hanna* as holding that the Enabling Act "should be read to protect the prerogatives of state law against incursions by a Federal Rule with somewhat less vigor than that

with which the Rules of Decision Act protects them in the absence of such a Rule").

1. Are the federal and state rules coextensive?

Fed.R.Civ.P. 41(b) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Rule 41(b) is based on four "conflicting policies: on the one hand, the court's need to manage its docket, the public interest in expeditious resolution of litigation, and the risk of prejudice to defendants from delay; on the other hand, the policy favoring disposition of cases on their merits." *Citizens Utilities Co. v. AT & T,* 595 F.2d 1171, 1174 (9th Cir.), *cert. denied,* 444 U.S. 931, 100 S.Ct. 273, 62 L.Ed.2d 188 (1979). This court has previously inferred from the first two policies that rule 41(b) is "in large part a housekeeping measure." *Nealey,* 662 F.2d at 1279. The other two policies reflect an interest in fairness to the litigants, and thus in considering dismissal under the rule the courts will consider whether the plaintiff has prosecuted the action diligently and to what extent any delay has prejudiced the defendant. *See id.* at 1279-81. The decision to dismiss under rule 41(b) is within the discretion of the district court. *Id.* at 1278; *Citizens Utilities,* 595 F.2d at 1174.

California Code of Civil Procedure section 583(b) provides:

> Any action heretofore to hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where

> the parties have filed a stipulation in writing that the time may be extended.

Like rule 41(b), section 583(b) dismissal for failure to prosecute is based on dual policy considerations: to encourage speedy litigation and decrease state trial court case backlog, *General Motors Corp. v. Superior Court*, 65 Cal.2d 88, 91, 416 P.2d 492, 495, 52 Cal.Rptr. 460, 463 (1966), and to protect defendants from indefinite delay during the pendency of an action, *Moran v. Superior Court*, 35 Cal.3d 229, 237, 673 P.2d 216, 221, 197 Cal.Rptr. 546, 551 (1983). Whittaker argues, however, that section 583(b) differs in scope from rule 41(b) in that section 583(b) provides for mandatory dismissal, whereas 41(b) provides for discretionary dismissal. On the basis of this alleged difference, Whittaker contends that the federal rule does not address the situation governed by the state rule, and that therefore the *Erie* analysis applies.

In determining the scope of section 583(b), we are bound by the California Supreme Court's interpretation of the section. *Aydin*, 718 F.2d at 904. The California high court has repeatedly held that although the language of section 583(b) is mandatory, it application is discretionary. *See, e.g., Moran*, 35 Cal.3d at 237-39, 673 P.2d at 221-23, 197 Cal.Rptr. at 551-52; *Hocharian v. Superior Court*, 28 Cal.3d 714, 719-23, 621 P.2d 829, 831-34, 170 Cal.Rptr. 790, 792-95 (1981) (discussing section 583(b) en route to construing section 581, and emphasizing parties' diligence in section 581 analysis). *Moran* notes the development of exceptions to the rule's mandatory language and the evolution of those exceptions into the current standard of "reasonable diligence in prosecuting [a] case." *Moran*, 35 Cal.3d at 237-38, 673 P.2d at 221-22, 197 Cal.Rptr. at 551-52.

Accepting the California court's interpretation, we find that both section 583(b) and rule 41(b) are discretionary dismissal statutes under which the trial court considers the housekeeping interests of the court and the reasonable diligence displayed by the parties. We therefore reject Whittaker's argument that the rules differ in scope, and find that the *Hanna* analysis, rather than the *Erie* analysis, is applicable here.

2. The Hanna analysis

Under *Hanna,* our first step ordinarily would be to determine whether this rule is within the limits of Congress' constitutional power and the Rules Enabling Act. The parties, however, have not attempted to argue that the rule is invalid for either reason. We therefore proceed to consider whether, despite the federal rule's validity and applicability, *Erie* considerations require us to enforce the state rule in its place.

We first look to the policy underlying *Erie:* the avoidance of forum-shopping and unequal administration of justice. The application of both rule 41(b) and section 583(b) depend on the post-filing conduct of all the parties and the court. We find it difficult to conceive that a plaintiff, before filing a lawsuit, might choose a federal forum rather than a state forum in the expectation that rule 41(b) would lead to a different outcome. Forum-shopping concerns are therefore inapplicable here.

We also reject Whittaker's argument that section 583(b) is a statute of limitations and that *Ragan* dictates that we enforce it in federal court. Initially we note that the section regulates conduct in prosecuting a suit rather than barring commencement of a stale action. Whittaker bases its argument on a California Supreme Court case

which notes that some of the policies underlying section 583(b) are the same as the policies behind statutes of limitations. *Crown Coach Corp. v. Superior Court,* 8 Cal.3d 540, 546, 503 P.2d 1347, 1350, 105 Cal.Rptr. 339, 342 (1972). Nothing in that case, however, nor in any other decision of the California Supreme Court cited to us, indicates that the California court considers section 583(b) a statute of limitations. On the contrary, as discussed above, we find that the California court interprets section 583(b) as providing for discretionary dismissal based on considerations of judicial efficiency and fairness to the parties. We therefore conclude that rule 41(b), rather than section 583(b), applies in diversity actions.

The district court dismissed Olympic's complaint and Universal's counterclaim under section 583(b). Because rule 41(b), not section 583(b), governs dismissals for lack of prosecution in diversity suits in federal court, both dismissals were erroneous. The decisions of the district court as to Olympic's claim and Universal's counterclaim are

REVERSED and REMANDED.

APPENDIX A

The complaint was filed March 1, 1978. The initial pretrial conference set for April 9, 1979, was, by stipulation, continued to July 9, 1979, and then, on behalf of Whittaker, set for November 19, 1979. Upon the parties' announcement of their intent to file motions for summary judgment, the court ordered a continuance to January 21, 1980. The conference was further continued to February 11, 980, pursuant to motions by the court. All parties then filed motions for summary judgment, and Whittaker moved for leave to amend its

answer and to file a counterclaim. On February 11, 1980, all motions were heard and taken under submission.

Approximately ten months later, in December 1980, the court denied all motions for summary judgment, and granted Whittaker leave to file a first amended answer and counterclaim. At this point, although the case had been pending for two and one-half years, Whittaker introduced several new issues.

On April 22, 1982, Olympic and Universal moved to set a date for a pretrial conference. They were opposed by Whittaker which moved to dismiss Olympic's claim pursuant to Fed.R.Civ.P. 41(b). The motions were heard on May 17, 1982, and the pretrial conference continued to June 14, 1982, and then to June 21, 1982.

On June 21, 1982, when the motions were finally heard, Whittaker's rule 41(b) motion to dismiss was denied and the pretrial conference was again continued when Whittaker expressed the need to conduct further discovery.

On March 1, 1983, the complaint had been filed for five years. Olympic and Universal moved for a pretrial conference on May 5, 1983. Whittaker opposed the motion and on May 27, 1983, moved to dismiss the action pursuant to California Code of Civil Procedure section 583(b) and rule 41(b) of the Federal Rules of Civil Procedure.

Hearing on the motions was, at Whittaker's request, continued to June 20, 1983, at which time the court tentatively ruled that the case be dismissed pursuant to section 583(b), but took the matter under submission. On September 14, 1983, the court issued its order for dismissal. Two weeks later it dismissed the counterclaim.

WALLACE, Circuit Judge, dissenting:

I dissent because the majority incorrectly interprets the California law as to the scope of Cal.Civ.Proc.Code § 583(b) (West 1976), which was superseded by Cal.Civ.Proc.Code §§ 583.310-.360 (West Supp. 1985) subsequent to the district court's decision.

The majority reaches its result by concluding that Fed.R.Civ.P. 41(b) and section 583(b) directly conflict. Rule 41(b) is clearly discretionary regarding dismissal for failure to prosecute. The majority advises us that while the *language* of section 583(b) requires mandatory dismissal after five years' failure to prosecute, California courts have *interpreted* this section to be discretionary. *See* at 915. Moreover, the majority finds that California courts have never equated section 583(b) with statutes of limitations. I disagree with these conclusions.

Under *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), a federal procedural rule only preempts a state rule if the two rules directly conflict. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749, 100 S.Ct. 1978, 1984, 64 L.Ed.2d 659 (1980) (*Walker*); *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 580 (9th Cir.1981). The question is whether the federal rule is broad enough to control; if so; *Hanna's* preemption applies. *See Walker*, 446 U.S. at 749-50 & n. 9, 100 S.Ct. at 1984-85 & n. 9. Rule 41(b), permitting discretionary dismissals, certainly conflicted with former Cal.Civ.Proc.Code § 583*(a)* (West 1976), which permitted *discretionary* dismissals only after two years from filing. There is no federal rule, however, corresponding to section 583*(b)*. Moreover, section 583(b) did not act to limit the availability of rule 41(b) dismissals. The sole difference is that after five years, section 583(b) deprives a plaintiff of his cause of action.

Thus, there is not direct conflict requiring *Hanna* analysis.

When there is no direct conflict, the proper analysis is to examine the importance of the policies behind the state rule. *See Walker,* 446 U.S. at 752-53, 100 S.Ct. at 1986. Here, California has expressed strong state policies supporting section 583(b), reflected by both precedent and legislative history. At the same time, there are no substantial federal interests at stake which dictate the majority's result.

I disagree with the majority's suggestion that section 583(b) is discretionary. The cases cited by the majority fail to support this construction of the statute. Those cases instead hold that there is a limited implied *exception* to the applicability of section 583(b) when it would be "impossible, impracticable or futile" for plaintiff to go to trial, despite the exercise of "reasonable diligence in prosecuting his or her case." *Moran v. Superior Court,* 35 Cal.3d 229, 238, 197 Cal.Rptr. 546, 551-52, 673 P.2d 216, 222 (1983) (*Moran*). Thus, the standard is not mere "reasonable diligence," as suggested by the majority, *see* at 915, but rather impossibility *in conjunction with* reasonable diligence. If any discretion exists, therefore, it is confined within these narrow limits. The majority's reliance on *Hocharian v. Superior Court,* 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829 (1981), which construed only Cal.Civ.Proc.Code § 581 (West 1976 & Supp.1985), is particularly troublesome in light of the fact that *Hocharian* was explicitly repealed by statute. *See Moran,* 35 Cal.3d at 243, 197 Cal.Rptr. at 555, 673 P.2d at 225 (Kaus, J., concurring) (observing that the legislation repudiated *Hocharian*); Cal.Civ-.Proc.Code § 583.240 law revision commission comment (West Supp.1985).

My analysis of the California law is bolstered by the California legislature's recognition of the limited nature of these implied exceptions. Their codification in the new statute emphasizes—in harmony with precedent interpreting section 583(b)—that dismissal after five years is "*mandatory* and . . . not subject to extension, excuse, or exception except as expressly provided by statute." Cal.Civ.Proc.Code §583.360(b) (West Supp.1985) (emphasis added). The only exceptions are if plaintiff shows that going to trial would have been "impossible, impracticable, or futile." *id.* § 583.340(c), or unless the court's jurisdiction was suspended or the trial was stayed or enjoined. *Id.* § 583.340(a), (b). One cannot read any discretion into this language. My analysis is also supported by the consistent statutory scheme of separating discretionary dismissals, *see* former section 583(a) and new sections 583.410-.420, from mandatory dismissals, *see* former section 583(b) and new sections 583.340-.360.

Moreover, California courts have consistently analogized section 583(b) to statutes of limitations, contrary to the majority's conclusions. *See, e.g., Crown Coach Corp. v. Superior Court,* 8 Cal.3d 540, 546, 105 Cal.Rptr. 339, 342, 503 P.2d 1347, 1350 (1972) ("The dismissal statutes, *like statutes of limitation,*" provide protections for defendants.) (emphasis added); *General Motors Corp. v. Superior Court,* 65 Cal.2d 88, 91, 52 Cal.Rptr. 460, 462, 416 P.2d 492, 494 (1966) ("The purposes served by [section 583(b)] are somewhat analogous to those underlying statutes of limitation."); *Lockhart-Mummery v. Kaiser Foundation Hospitals,* 103 Cal.App.3d 891, 896, 163 Cal.Rptr. 325, 328 (1980) (treating section 583(b) as a statute of limitations).

A statute of limitations requires a plaintiff to *present* his claim within a reasonable period of time. This section

extends that policy by further requiring a plaintiff to remain diligent in *prosecuting* his claim. Both limitations therefore act as qualifications on a plaintiff's ultimate right of redress, terminating that right at different stages. In both instances, the interests of defendants are protected. Absent a showing of impracticability, a defendant has a substantive *right* to have an action dismissed after five years. This can hardly be labeled merely a "procedural" right. Indeed, unless section 583(b) is enforced, the policies behind statutes of limitations could be defeated by merely filing suit and then failing to prosecute for extended periods of time. Where is the protection for the defendant? California explicitly ensured it by section 583(b).

A plaintiff's cause of action is created by state law, and must therefore be measured by that same state law, *see Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533, 69 S.Ct. 1233, 1235, 93 L.Ed. 1520 (1949), and "[i]t accrues and comes to an end when local law so declares." *Id.* As the majority already states, [s]tatutes of limitations, *which dictate the life of state causes of action,* are too intimately connected with the substance of the state-created right to be disregarded by the federal courts" At 913 (emphasis added). Here, a plaintiff's cause of action remains alive only for five years following its filing, absent a showing that it was impossible to bring the case to trial. Enforcement of section 583(b) would result in no major disruption in the proceedings of the federal courts. Therefore, it should be enforced.



APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 16 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

OLYMPIC SPORTS PRODUCT, INC.,
Plaintiff/Appellant,
v.
UNIVERSAL ATHLETIC SALES CO., UNIVERSAL GYM EQUIPMENT CO., etc., et al.,
Defendants/Appellees.

No. 83-6332
No. 84-5736

UNIVERSAL GYM EQUIPMENT, INC.,
Counterclaimant/Appellant,
v.
OLYMPIC SPORTS PRODUCTS, INC.,
Counterdefendant/Appellee.

ORDER

Before: WALLACE and BOOCHEVER, Circuit Judges, and JAMESON,* District Judge.

Judges Boochever and Jameson have voted to deny the petition for rehearing. Judge Wallace would grant the petition for rehearing. The panel recommended rejection of the suggestion of rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

C1

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ENTERED

SEP 14 1983

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 83-6

FILED

SEP 14 1983

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY CA DEPUTY

OLYMPIC SPORTS PRODUCTS, INC.,

Plaintiff,

vs.

UNIVERSAL ATHLETIC SALES COMPANY, UNIVERSAL GYM EQUIPMENT COMPANY, a California corporation, WHITTAKER CORPORATION, a Maine corporation, FIRST NORTHWEST INDUSTRIES OF AMERICA, INC., a Washington corporation,

Defendants,

AND RELATED CROSS ACTIONS.

CASE NO. CV78-0802 ALS

ORDER GRANTING MOTION TO DISMISS

Plaintiff Olympic Sports Products, Inc. is a corporation incorporated under the laws of the State of Florida and defendants Universal Athletic Sales Co., Whittaker Corporation, and First Northwest Industries of America, Inc. are corporations incorporated respectively under the laws of the States of California, Maine and

Washington, having their principal places of business in states other than the State of Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Jurisdiction is founded on 28 U.S.C. §1332, diversity of citizenship and amount in controversy.

On March 1, 1978 Olympic Sports filed a complaint for damages and equitable relief against the above-named defendants. The complaint alleges that plaintiff and defendants entered into a series of distribution agreements whereby plaintiff was to act as a distributor of defendants' athletic equipment in identified states in the southeastern portion of the United States, and that defendants agreed to arrange for the shipping of the equipment to Olympic Sports, pay for the freight charges, and then bill Olympic Sports for the corresponding freight charges. Pursuant to the agreement, plaintiff distributed defendants' equipment from late 1965 until October, 1976.

The complaint further alleges that defendants breached the contracts by billing plaintiff for freight charges in excess of the actual freight costs that were being charged to defendants by the carriers. Plaintiff's complaint prayed for $375,000 in actual damages, $9,000,000 in punitive damages, and imposition of a constructive trust.

On April 20, 1982, Universal Gym filed a motion for pretrial conference. On May 7, 1982, Whittaker filed an opposition to Universal Gym's motion for pretrial conference. Whittaker's opposition papers also contained a request for dismissal of plaintiff's complaint against Whittaker for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. On May 12, 1982, Olympic Sports filed a joinder in Universal Gym's motion for pretrial conference and an opposition

to Whittaker's request for dismissal pursuant to Rule 41(b).

On June 21, 1982, a hearing was conducted on Whittaker's Rule 41(b) motion and the motion was denied without prejudice. Universal Gym's motion for pretrial conference was also denied on the basis of a request by Whittaker to conduct further discovery.

On May 3, 1983 Olympic Sports filed a motion for a pretrial conference. On May 27, 1983, Whittaker filed a motion to dismiss for failure to prosecute pursuant to Section 583(b) of the California Code of Civil Procedure and Rule 41(b) of the Federal Rules of Civil Procedure.

On June 20, 1983, Whittaker's motion to dismiss was heard and tentatively granted.

Erie R. Co. v. Tompkins, 304 U.S.64 (1938) established the general principle that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the state." 304 U.S. at 78. Cases applying *Erie* have concluded that in diversity actions, federal courts are bound to follow state statutes of limitations. *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945); *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530 (1949), *Alonzo v. ACF Property Management, Inc.,* 643 F.2d 578 (9th Cir. 1981).

In *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530 (1949), the United States Supreme Court held that "[w]e cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co. v. Tompkins.*" 337 U.S. at 533-534; *accord, Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980).

In the instant case, the applicable state statute is Section 583(b) of the California Code of Civil Procedure. Section 583(b) provides:

> Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

Olympic Sports filed its suit on March 1, 1978. Under Section 583(b), therefore it was required to bring the case to trial within five years after the filing of its complaint, *i.e.*, by March 2, 1983. Since plaintiff failed to comply with Section 583(b) by bringing its case to trial within the statutorily prescribed time period, its action against Whittaker must be dismissed.

Olympic Sports seeks to avoid dismissal by arguing that Section 583(b) is not a state statute of limitation, and therefore does not come within the rule of *Erie R. Co. v. Tompkins* and its progeny. Section 583(b), however, like statutes of limitations, promotes the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed, and protects defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time. See *Crown Coach Corp. v. Superior Court*, 8 Cal. 3d 540, 546, 503 P.2d 1347, 1350, 105 Cal. Rptr. 339, 342 (1972). Since Section 583(b) furthers these important objectives in a cause of action arising under state law, and does not directly conflict with any federal rule of civil procedure, see *e.g. Hanna v. Plumer*,

380 U.S. 460 (1965), it is properly applied in a federal diversity case.

Plaintiff also argues that even if Section 583(b) applies in the instant case, defendant Whittaker by its actions is estopped from asserting the statute. Citing *Borglund v. Bombardier Ltd.*, 121 Cal. App. 3d 276, 175 Cal. Rptr. 150 (1981), plaintiff argues that Whittaker lulled Olympic Sports into a false sense of security by representing to Olympic Sports that Whittaker would not file further motions to dismiss until after Whittaker had conducted more discovery.

In the context of this setting, Mr. Christianson, counsel for plaintiff, recalls a telephone conversation with Mr. Greenberg, who represented Whittaker. A declaration by Mr. Christianson concerning the conversation is before the court. The pertinent part of the declaration is as follows:

> 5. In August 1982, I telephoned Mr. Greenberg, WHITTAKER's counsel, with regard to establishing a date for the deposition. Mr. Greenberg informed me that he was involved in a heavy trial calendar and would not be able to schedule such depositions until November or December. I informed Mr. Greenberg that I would not object to that delay under the circumstances of his trial calendar, but I did not want to see another Motion to Dismiss for failure of prosecution. He promised me that no such Motion would be made; he would take his deposition and we could proceed to trial.
>
> 6. When no deposition had been scheduled by December 22, 1982, I sent a letter to Mr. Greenberg, copy of which is attached, enclosing a stipulation that Mr. Greenberg contact me

> to schedule the deposition date. A copy of that letter is attached hereto marked Appendix A and incorporated herein by reference.
>
> 7. I received no response from Mr. Greenberg to my letter dated December 22, 1982. I therefore scheduled a new motion for pre-trial conference and a setting of a trial date.

The motion for pre-trial conference which the declaration mentions in the last paragraph quoted was filed on May 3, 1983. It is important to note that the context of the setting for the agreement referred to in the declaration was a Federal rule, Rule 41(b), which is largely discretionary.

In response to the May 3, 1983 motion for pre-trial conference, Whittaker moved to dismiss pursuant to California Code of Civil Procedure Section 583(b), which is in no sense discretionary. This was coupled with a repeat of the Federal Rule 41(b) motion which assumes no significance in this discussion. The motion of plaintiff for pre-trial conference was almost exactly two months after the fifth anniversary of the time the complaint was filed.

California law requires dismissal of the action unless "the parties have filed a stipulation in writing that the time may be extended" or unless the defendant is not entitled to this relief because the defendant has misled or deceived the plaintiff. No stipulation that the time mentioned in 583(b) may be extended was filed. The question is whether or not plaintiff has been misled or deceived by defendant.

Mr. Goldberg [sic] has categorically denied the conversation alluded to by Mr. Christianson. It is always unfortunate when the court is faced with deciding between conflicting representations made by reputable

opposing counsel and especially painful when the decision will be dispositive of the litigation. This case may not present such a total conflict. As has already been pointed out, the conversation which Mr. Christianson remembers was in the context of Federal Rule 41(b) while the dispositive nature of the controversy is dependent upon state statute. The sequence of events in the record clearly indicates that neither party had the state statute in mind at the time fixed by Mr. Christianson for the questioned conversation. If Mr. Christianson had this statute in mind, it would be incredible to think that he would not have limited the time for discovery in writing or insisted upon the written stipulation mentioned in CCP 583(b). On the other hand, if this statute had been in Mr. Goldberg's [sic] mind, it is unlikely that he would have waited for Mr. Christianson to move for a pre-trial conference when he could have moved for dismissal under the statute almost two months before plaintiff's May 3, 1983 motion. Agreements must be construed according to the intentions of the parties. What neither party had in mind cannot be the subject of an agreement couched in general terms. This case has not been vigorously prosecuted by either plaintiff or defendant. The five-year deadline slipped by unnoticed by all counsel and regrettably past the court as well.

One more thing must be said. CCC 583(b) requires the court "upon its own motion" to dismiss the action after the expiration of five years. No criticism may be justly made of any person concerned for calling the situation to the attention of the court. The court is compelled to reject plaintiff's argument that the doctrine of estoppel avoids the application of Section 583(b) to bring this case to an end.

In accordance with the above determinations, defendant Whittaker's motion to dismiss pursuant to Section 583(b) of the California Code of Civil Procedure is *Granted.* The Clerk is ordered to enter a judgment of dismissal.

Dated: Sept. 14, 1983

Albert Lee Stephens, Jr.
United States District Judge

APPENDIX D

California—Section 583.310, Cal. Code of Civil Procedure

Georgia—OCGA Section 9-11-41(e)

Iowa—Rule 215.1, Iowa Rules of Civil Procedure

Louisiana—Art. 561, LSA Code of Civil Procedure

Nevada—Rule 41(e), Nev. Rules of Civil Procedure

New Mexico—Rule 4(e)(1), N.M. Rules of Civil Procedure

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 13, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

William F. Davis, Esq.
881 Alma Real Drive
Suite 305
Pacific Palisades, California 90272

David P. Christianson, Esq.
500 South Main Street
Suite 512
Union Bank Square
North Tower
Orange, California 92668

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-832

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

OLYMPIC SPORTS PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent
OLYMPIC SPORTS PRODUCTS, INC.

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding a state law relating to dismissal of actions is inapplicable in federal courts even though jurisdiction is based solely upon diversity of citizenship?

2. Did the court below err in its interpretation of California's construction of its mandatory dismissal law for failure to bring a case to trial within a specified period of time.

3. Did the decision of the court below conflict with the standard of review utilized by other circuit courts of appeal.

PARTIES INVOLVED

Three separate corporations were parties in the court below. Plaintiff and respondent herein, Olympic Sports Products, Inc. ("Olympic"), a Florida Corporation, Defendant and petitioner herein, Whittaker Corporation

("Whittaker"), a California corporation, and a codefendant and counter-claimant herein, Universal Gym Equipment, Inc. ("UGE"), a California corporation, UGE's counterclaim is only against Olympic.

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No. 85-832

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

WHITTAKER CORPORATION,	)
	)
Petitioner,	)
	)
v.	)
	)
OLYMPIC SPORTS PRODUCTS, INC.,	)
	)
Respondent.	)
	)

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OFFICIAL AND UNOFFICIAL REPORTS

OF OPINIONS DELIVERED

IN THE COURTS BELOW

The official and unofficial reports of opinions delivered in the courts below were attached as appendices to the petition for writ of certiorari filed on

behalf of Whittaker Corporation. Accordingly it is not deemed necessary or appropriate to duplicate those in this brief.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The petition for writ of certiorari identifies the grounds upon which the petitioner contends this court has jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATIES, ETC. WHICH THE CASE INVOLVED

No constitutional provision or treaties appear to apply in this case.

STATEMENT OF THE CASE

This case involves a series of distributorship agreements entered into between respondent Olympic Sports Products, Inc. ("Olympic") and appellant Whittaker Corp. ("Whittaker"). Respondent acted as distributor of appellant's athletic equipment from 1965

until 1976. The distributorship agreements provided that Olympic would pay for the freight charges incurred by appellees in transporting the athletic equipment to Olympic. However, Olympic discovered that instead of passing through the freight charges incurred appellees were making a secret profit by overcharging Olympic for said transportation in a sum in excess of $375,000,00.

Accordingly, respondent filed suit for breach of the agreements and fraud in the United States District Court, Central District on March 1, 1978. (E.R. 1) Appellant Whittaker filed a motion to dismiss the action. Subsequently, the District Court granted the motion and dismissed the case of September 14, 1983, expressly pursuant to California Code of

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[1] E.R. refers to the Excerpts of Record filed by appellant.

Civil Procedure Section 583(b) ("CCP Section 583(b)") for respondent's failure to bring the case to trial within five (5) years from the filing of the complaint. (A.B. 3a)[2] (E.R. 78) In concluding it had no discretion but to dismiss, the District Court found the California statute was substantive rather than procedural, and therefore Federal Rule of Civil Procedure 41(b) ("Rule 41(b)")(A.B. 2a) did not apply. (E.R. 81-82)

The basis for subject matter jurisdiction in the district court was diversity of citizenship under 28 U.S.C. Section 1332. The district court's decision was subsequently reversed by the court below on the ground that the California Code of Civil Procedure Section 583(b) was "discretionary" and, therefore, in accordance with the analysis outlined

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[2] A.B. refers to appellant's Addendum to Brief.

in Hanna v. Plumer, 380 U.S. 460 [85 S.Ct. 1136, 14 L.Ed.2d 8](1965), Rule 41(b) of the Federal Rules of Civil Procedure had to govern.

ARGUMENT

1. Statement of Facts.

Respondent filed its complaint for breach of contract and fraud on March 1, 1978. (D.E. 1) The pre-trial conference was set for April 9, 1979, and was continued by stipulation to July 9, 1979. (D.E. 17, 18) Thereafter, Whittaker sought a further continuance of the pre-trial conference to November 19 of that year. (D.E. 19) Both respondent's and appellant's pre-trial documents were filed in advance of the November date. (D.E. 22-24) On the Court's own motion the conference was further continued to January 21, 1980. Whittaker opposed the setting of a trial date since it intended to conduct discovery and announced its

intention of filing a motion for summary judgment and upon that basis the parties stipulated to a further continuance to February 4, 1980. (D.E. 25, 26) Subsequently, all parties filed motions for summary judgment and, in addition, Whittaker filed motions for leave to amend its answer and to file a counterclaim. These motions were set for hearing on February 11, 1980, and the Court, on its own motion, consolidated these matters by continuing the pre-trial conference to February 11, 1980. (D.E. 28-30) (D.E. 34) On that date, the Court entertained oral argument on the various motions, then took them under submission. (D.E. 43)

Ten (10) months later, on December 8, 1980, the Court issued a decision denying all motions for summary judgment, but granting Whittaker leave to file a first amended answer and counterclaim. (D.E. 44) This case thereafter entered into a

whole new phase of discovery with Whittaker's counterclaim introducing several new issues after the case had been pending for over 2-1/2 years.

Thereafter, when it became apparent the Court would not set a pre-trial conference on its own, UGE was joined by respondent in a motion requesting a pre-trial conference which was scheduled for hearing on April 22, 1982. Respondent and UGE were fully prepared to proceed to trial at this time. However, the motion was opposed by Whittaker, who moved to dismiss the action under Rule 41(b). (D.E. 48) Whittaker's motion to dismiss was not brought under California law, but was grounded solely upon the Federal Rules, which was the basis upon which respondent opposed the the motion. (D.E. 49, 50) The motion was not heard as scheduled, but instead was continued to June 14 on the Court's own motion (D.E.

47) However, Whittaker then requested a continuance which the Court granted. (D.E. 54) The motions were finally heard on June 21, 1982, at which time the Court denied Whittaker's Rule 41(b) motion to dismiss. At this hearing, the Court postponed the pre-trial conference upon Whittaker's request after it convinced the Court of its need to conduct discovery it claimed was necessary to prepare for trial. (D.E. 53; E.R. 97, 101)

Curiously, Whittaker never initiated the discovery despite respondent's willingness to cooperate. Respondent remained willing and able to go to trial as soon as Whittaker had completed discovery. Plaintiff's counsel contacted Defendant's counsel to schedule dates for discovery but was informed by Defendant's counsel that Defendant's counsel could not schedule dates because Defendant's counsel was involved in numerous pending trials

outside of the state. Defendant's counsel assured Plaintiff's counsel that the delay would not result in any further motions to dismiss and that depositions would be scheduled later in the year.

On March 1, 1983, five years elapsed on the complaint. The date passed unnoticed and unremarked by the parties, who believed Rule 41(b) was controlling.

On May 3, 1983, respondent decided it had waited long enough for Whittaker to take its discovery, and filed a second motion for pre-trial conference joined by UGE. (D.E. 56) Whittaker opposed the motion, and refiled its motion to dismiss. (D.E. 58, 59) Less than a year before Whittaker had made a futile attempt to persuade the Court to dismiss the case under Rule 41(b). The continuance afforded by the Court after that denial had been solely at the request of Whittaker and for its benefit alone.

Whittaker thus had no factual basis upon which to base a second Rule 41(b) motion and was forced to bolster its request by arguing that CCP Section 583(b) was controlling, thus mandating that the Court dismiss the action. This was the first instance in which California procedure was suggested to be controlling.[3] Both motions were continued to June 20, 1983, again at Whittaker's request, at which time the Court preliminarily granted Whittaker's motion to dismiss under California law, although the Court took the motion under submission. (D.E. 60, 65; E.R. 102) At the hearing, the Court declared that CCP Section 583(b) was controlling and that it had no choice but to dismiss. (E.R. 105,

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[3] Judge Stephens stated that CCP Section 583(b) was introduced into the case in the 1982 motion to dismiss. (E.R. 105) However, a review of the transcript of proceedings for that hearing, (E.R. 90) and the moving and opposing papers involved, (D.E. 48, 49) show no such reference to California law.

116) Over three months later, the Court issued a decision dismissing the action, and entered judgment on September 30, 1983. (D.E. 66, 68) On appeal before the Court of Appeals for the Ninth Circuit Court, the decision was reversed.

2. The Ninth Circuit Court properly found that Rule 41(b) governed the question of dismissal and that the District Court erred in applying the State Statute instead of the federal rule.

The long standing doctrine of Erie Ry. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny established the applicability of state substantive laws, but not state rules of procedure, to federal diversity cases. Respondent submits that CCP Section 583(b) is not a substantive law, but merely a procedural rule of case management, which permits dismissal if an

action is not brought to trial within five years of being filed. The rules governing the dismissal of federal actions, including diversity cases, are embodied in Rule 41(b), which rule provides for discretionary dismissal for the failure to prosecute. In ruling that CCP Section 583(b) was controlling and thereby mandated the dismissal of the action for failure to bring it to trial within five (5) years, the District Court erroneously applied a California procedural statute.

Both Appellate Court cases have labeled CCP Section 583(b) and similar statutes as merely state housekeeping rules, unquestionably procedural in nature and clearly inapplicable to diversity cases. Specifically, the Ninth Circuit has previously construed CCP Section 583 as a procedural rule in Nealey v. Transportacion Maritima Mexicana, 662 F.2d 1275 (9th Cir. 1980), and that decision

should be controlling in the case at Bar. In Nealey, plaintiff failed to serve a complaint within three (3) years as is required under CCP Section 583 in an action initiated in state court, but subsequently removed to federal court.

The Ninth Circuit found the District Court erroneously applied CCP Section 583, a state procedural statute, in dismissing the action, indicating that Rule 41(b) was clearly controlling under the Erie doctrine. Footnote 5 to the decision is dispositive of the issue presented in this appeal. Insisting that state law should be controlling, that footnote relates how Nealey's brief argued the nonapplicability of Rule 41(b) to removed actions. At oral argument, Nealey's new attorney conceded the applicability of federal law. The Ninth Circuit stated in this footnote:

> We believe that under the doctrine of Erie R.R. Co. v.

> Tompkins, 304 U.S. 64, 58 S.Ct 817, 82 L.Ed. 1188 (1938), and its progeny, rule 41(b) is applicable to a removed action and may form the basis for dismissal of such an action. Nealey, supra, 662 F.2d at 1278.

In support of its view of the irrelevance of CCP Section 583, the Ninth Circuit specifically indicated:

> "the federal court is not the proper forum in which to serve the housekeeping interests of the state courts, the primary goal of 583." Id. at 1282.

Thus, in Nealey, CCP Section 583 was deemed procedural even though the case was commenced in state court and later removed to federal court. If CCP Section 583 is procedural within the context of Nealey, it remains procedural for all federal

diversity cases. The situation in the instant case presented to the Ninth Circuit Court an even stronger case, for unlike Nealey, the instant case was initially filed in the Federal Court. Accordingly Rule 41(b) was properly found to be controlling.

Nealey further stated with regard to Rule 41 (b) that once parties are in the federal system, "[t]hey must now recognize that the conduct of business here is motivated by our own house keeping concerns, and not those of our state court brethren." Nealey, supra, 662 f. 2d at 1279. This comports with "the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of these rules will inevitably differ from comparable state rules." Id., citing Hanna v. Plumer, 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965). In reversing the lower

court decision applying CCP Section 583, the Ninth Circuit concluded that "no federal housekeeping interest was advanced by depriving respondent of this cause of action." Id. at 1279. (Emphasis in original).

The Second Court of Appeals case to declare a similar state statute to be procedural in nature is Lumbermen's Mutual Cas. Co. v. Wright, 322 F.2d 759 (5th Cir. 1963). Lumbermen's also involved a diversity case wherein the failure-to-prosecute statute of Louisiana was deemed inapplicable to federal actions. The statute under review, Article 3519 of the Louisiana Statutes Annotated Civil Code (A.B. 4a), is virtually identical to CCP Section 583(b) in deeming abandoned any action wherein nonprosecutorial steps have been taken for five (5) years.

The Court of Appeals in Lumbermen's

found Rule 41(b) and Article 3519 did not necessarily cause a collision between conflicting federal and state policies. "Here there is federal law, Rule 421(b), covering the problem created by a litigant's lack of prosecution of a case." Lumbermen's, supra, 322 F.2d. at 764. In affirming the Court's earlier decision, the purpose of the Federal Rules was stated to be to increase uniformity in federal courts "by getting away from local rules." Id. The Court of Appeals stated:

> Rule 41 specifically regulates the dismissal of actions. The rule is essentially a matter of federal courts administering the cases before them, and has no necessary relation to a state system of limitations. As long as there is still the breath of life in a suit kept alive by

> the federal courts, it strikes us as unseemly to allow the state to kill the case . . . .
>
> If we should require Rule 41(b) to yield to Article 3619, the discretionary powers of a federal district court would be seriously curtailed. Id. at 765.

The Fifth Circuit in Lumbermen's further rejected the argument that the Louisiana statute was tantamount to a statute of limitations and, therefore, substantive in nature. The statute is deemed not one of prescription, but only as a provision of Louisiana general practice and procedure. Lumbermen's, supra, 322 F.2d. at 763. Clearly, statutes of limitations which govern the time frame within which a legal right must be exercised are substantive in nature, as were the rulings in both Walker V. Armco

Steel Corp., 446 U.S. 740, 100 S.Ct. 1979,64 L.Ed.2d. 659 (1980), and Alonzo v. ACF Property Management, Inc., 643 F.2d. 578(9th Cir. 1981).

Clearly, California Courts view CCP Section 583 as a purely procedural function of "judicial concern", not integral to any substantive law. Hocharian v. Superior Court, 28 Cal.3d 714, 724, 170 Cal.Rptr. 790, 621 P.2d. 829 (1981); Butler v. Hathcoat, 146 Cal. App.3d 834, 838-39, ___ Cal.Rptr. (1983). As long as the plaintiff has exercised reasonable diligence in pursuing his action, California courts will try cases on their merits despite delays in excess of CCP Section 583(b) "limits". Hocharian, Id. at 721. The sole purpose of CCP Section 583(b) is to insure diligence and conscientiousness on the part of litigators in bringing cases to trial by placing a five-year cutoff on

trial preparation. Yet, as will be seen below, CCP Section 583 (b) has been construed as inapplicable when delays in the progress of litigation are not a result of plaintiff's conduct.

The principles set forth in Erie and its offspring, including Walker in the Supreme Court, and Nealey and Lumbermen's in the Court of Appeals, establish CCP Section 583(b) as a state procedural rule of court administration not applicable to federal diversity cases. Rule 41(b) absolutely controls the progress of cases, and their disposition for failure to prosecute. Only Rule 41(b), therefore, could have been applied to respondent's case, although this rule was not a factor in the District Court's decision to dismiss the complaint.

In the instant case, the District Court erred in linkening CCP Section 583(b) to a statute of limitations and

deeming it to be binding, substantive law. As discussed above, CCP Section 583(b) is not a statute of limitations. It has no bearing on respondent's ability to exercise the legal rights which form the underlying bases of the lawsuit. CCP Section 583(b) focuses on the conduct of the parties after the suit has commenced and serves as a housekeeping rule which governs the progress of cases at all stages of litigation.

As noted above, the California State courts would not have ruled dismissal to be mandatory under CCP Section 583(b) and the Ninth Circuit court of appeals properly determined that Rule 41(b) applied, thereby reversing the decision of dismissal of the District Court.

3. The majority decision and the court below properly followed California's construction of CCP Section 583(b) of the court of

civil procedure.

Despite the apparent mandatory language of CCP Section 583(b) that civil cases "shall be dismissed" if not brought to trial within five years, California courts have developed exceptions that allow a court to use its discretion in applying the statute. In the instant case, the District Court failed to exercise its discretion, and even believed it had none, and therefore granting of dismissal without considering CCP Section 583(b)'s exceptions was an abuse of discretion.

California courts would not hold respondent Olympic responsible for the case extending beyond five years. Respondent was ready for trial long before the five years passed. All of the delay from the time respondent was prepared to go to trial in 1979, and again in 1982, is attributable to Whittaker and the District

Court. Respondent filed its pre-trial documents on November 13, 1979. (D.E. 23) Continuances on behalf of the Court and Whittaker delayed the hearing to February 11, 1980. (D.E. 25, 26, 34) The Court then took ten months to decide the motions, during which time it would have been unreasonable for the parties to conduct any additional discovery. When the motion was granted on December 8, 1980, there ensued two years of intensive discovery on the part of respondent, on account of the new issues interjected into the case by Whittaker's counterclaim which the District Court allowed after the case had been pending for over 2-1/2 years. After its December 1980 ruling, the Court did nothing to move the case toward trial, failing even to set the case for pre-trial conference. Respondent finally had to motion the Court in May 1982, which motion was continued by the Court and Whittaker.

(D.E. 51, 47, 54) On June 21, 1982, the Court denied Whittaker's Motion to Dismiss, and postponed the pre-trial conference to allow Whittaker to conduct discovery necessary for trial. (D.E. 53)

Whittaker procrastinated until respondent was forced to file another motion on May 3, 1983. (D.E. 56) The Court continued the pre-trial conference to June 20, and on that date the Court took the various motions under submission. (D.E. 60, 65) Three months later, the Court finally dismissed respondent's complaint and UGE's counterclaim, and entered final judgment on September 30, 1983. (D.E. 68)

This abbreviated chronology shows that respondent was prepared to go to trial on November 13, 1979, when it filed its pre-trial documents. Whittaker and the Court were thereafter responsible for over a year of delay. The Court's failure

to set a pre-trial conference in either 1982 or 1983 resulted in further delays to the parties, to the extent that respondent had to move on two occasions to force the Court to set a pre-trial conference. At each such motion, Whittaker filed opposition and sought postponements of the pre-trial conference. Whittaker's procrastination in failing to take the depostions of plaintiff's witnesses it claimed were necessary was responsible for over a year of delay, during which the five-year period ran. At no time could respondent be held responsible for any delay, other than in extending the usual professional courtesy to Whittaker to allow it the opportunity to prepare for trial.

California law says discretion in applying CCP Section 583(b) exists, and must be exercised. The object of CCP Section 583(b) is to avoid endless,

unmeritorious actions, and lost evidence or memories. Moran v. Superior Court, 35 Cal.3d 229, 197 Cal.Rptr. 546 (1983). In the Moran case, the California Supreme Court refused to uphold dismissal under CCP Section 583(b), although the complaint was filed more than five years before trial was set. The Court found the appropriate guideline for evaluating whether CCP Section 583(b) will apply to a given case is the "reasonable diligence" standard. Id. at 239; Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829 (1981); Karubian v. Security Pac. Nat. Bank, 152 Cal.App.3d 134, 139, ___ Cal Rptr. (1984); Griffis v. S. S. Kresge Co., Cal.App.3d ___, 197 Cal.Rptr. 771, 774 (1984). If the plaintiff has demonstrated reasonable diligence in pursuing his action, in the Court's view CCP Section 583(b) has been met. Any dismissal of the

case under the statute would then be an abuse of discretion. Id.

The reasoning underlying the reasonable diligence standard of CCP Section 583(b) is to accomplish the prevention of avoidable delay. Five years is thus not the arbitrary close to all proceedings. Id. at 238. Compliance with CCP Section 583(b) is not required when caused beyond the control of plaintiff make it impossible, impracticable, or futile to begin trial in five years. Karubian, supra, 152 Cal.App.3d at 139. "The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." Moran, supra, 35 Cal.3d at 238; Hocharian, supra, 28 Cal.3d at 720.

The Supreme Court found the Moran plaintiff's overall conduct during the five years demonstrated reasonable

diligence. She actively participated in discovery, made motions, and participated in arbitration hearings. When the five year deadline approached, she actively attempted to set the case for trial. Moran, supra, 35 Cal.3d at 239-40. The Court found the plaintiff had demonstrated reasonable diligence, and therefore the impossibility exception to CCP Section 583(b) excused plaintiff's failure to bring the case to trial within five years. Id. at 240. The Court's holding focused on the reasonableness of plaintiff's conduct, and that others were the source of delays. Thus the Court did not find CCP Section 583(b) controlling, stating that "[d]espite the mandatory language of the section, this court has made an effort to 'set [] reality above artificialty' in applying CCP Section 583(b)." Id. at 237, citing Christin v. Superior Court, 9 Cal.2d 526, 532, 71 P.2d

205 (1937).

The California Supreme Court's responsible diligence standard originated in Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829 (1981). In that case, plaintiff failed to discover a possible defendant within the three years granted by statute. The Court stated that the result of an inflexible interpretation of CCP Section 583 is often unfair. If the plaintiff has exercised reasonable diligence, actions should be tried on the merits despite delays in excess of statutory limits. The Court clearly stated that CCP Section 583 does not require "a plaintiff to be more than reasonably diligent." Id. at 721. Thus, when compliance is impossible, impracticable or futile, it is excused. Id.

To determine whether a factual situation falls under an exception to CCP

Section 583(b), the critical question for California courts is whether the plaintiff's unreasonable conduct led to noncompliance with the statute. Id. at 722 fn. 6. Plaintiff's conduct is thus the focus of the reasonable diligence inquiry. Id. Applying this test to the facts, the Hocharian Court found the plaintiff had been reasonably diligent. In the absence of demonstrable prejudice, dismissal for failure to comply with the case progress statute was reversed, mandating a hearing as to whether the plaintiff had prosecuted the action with reasonable diligence.

The California Court of Appeal refused to order dismissal under CCP Section 583(b), despite failure to begin trial within five years, in Butler v. Hathcoat, 146 Cal.App.3d 834, Cal.Rptr. ___ (1983). In that case, eight years passed between the date the

complaint was filed and the date the dismissal was granted. The Court cited to Holder v. Sheet Metal Worker's Internat'l. Ass'n., 121 Cal.App.3d 321, 325, 175 Cal.Rptr. 313 (1981), in stating the philosophy behind dismissal statutes such as CCP Section 583(b) of trying cases on their merits whenever possible. Id. at 838-39. This philosophy examines each case on its own particular facts in determining whether dismissal affords substantial justice. Courts will therefore allow exceptions to CCP Section 583(b)'s apparently mandatory language to provide diligent plaintiffs their day in court, despite delay which might otherwise point to dismissal. Id.; Hocharian, supra, 28 Cal.3d at 721.

It would be unfair in the instant case to deny respondent a trial on the merits when reasonable diligence has been demonstrated. Like the plaintiffs in

Moran and Hocharian, respondent was active in conducting discovery through the five year period. Documents proving respondent's damages, which were either lost or destroyed by Whittaker, had to be laboriously reconstructed by respondent's expert. (E.R. 95-99) Once this project was completed, respondent was ready and eager to proceed to trial, as demonstrated by its Motions for Pre-Trial Conference. There is no evidence that Whittaker was prejudiced in any way. Indeed, Whittaker stated at the June, 1982 hearing that the documents necessary for trial had not been in Whittaker's possession since before 1978. Thus, the reasonable conduct of respondent, and lack of prejudice to appellant, indicates the inapplicability of CCP Section 583(b).

A case dealing with facts closely similar to respondent's is Westinghouse Elec. Corp. v. Superior Court, 143

Cal.App.3d 95, 191 Cal.Rptr. 549 (1983). In that case, plaintiff filed an At-Issue Memorandum, but the settlement conference was continued, at the request of defendant, to permit defendant to file a cross-complaint. Plaintiff agreed to several further continuances to enable the various defendants to cross-complain and answer. Finally, more than five years after the complaint was filed, all parties submitted Settlement Conference Statements. One defendant estimated that discovery would take an extra period of time to complete. At the settlement conference, it was discovered that the five years had run, and a motion to dismiss was thereafter made and denied by the trial court.

The trial court had found plaintiff not responsible for the delay in bringing this case to trial, and no existing prejudice to defendants from the delay.

The court found nearly all of the delay was at the request of the defendants or for their benefit. Id. at 102. On these bases, the motion to dismiss under CCP Section 583(b) was denied.

The California Court of Appeal found CCP Section 583(b) did not apply to the facts of the case, because it was beyond the plaintiff's control to bring the action to trial within five years. In the Appellate Court's view, the policy behind the exception to CCP Section 583(b), of disposing of actions on their merits rather than on procedural grounds, characterized CCP Section 583(b) as a procedural rule. Westinghouse, supra, 143 Cal.App.3d at 104.

As an example, the Court stated that if plaintiff has completed discovery and is ready to go to trial, but the defendant is not diligently pursuing discovery, it is defendant's fault that the case is not

brought to trial. In such a case, impracticability excuses compliance with CCP Section 583(b) "if plaintiff's conduct is otherwise reasonable." Id. at 106.

Even though plaintiff was somewhat inadvertent in missing the five-year deadline, the Court looked to all circumstances in the case to find that impracticability remained. Westinghouse, supra, 143 Cal.App.3d at 106. It was of importance to the Court that the defendant's lack of preparation and delays were responsible for the five-year passing. And, as in appellant's case, there was no prejudice shown to defendants by the delays, despite the usual presumption of such. Finally, the Court did not wish to penalize plaintiff for its courtesy in stipulating to continuances. Id. at 107. Thus, plaintiff's conduct was reasonably diligent, and its inadvertence was excused. Id. at 110.

In view of the above cases, it is clear respondent should not be held responsible for the periods of inactivity which delayed this case. The circumstances made it impossible for respondent to comply with CCP Section 583(b), so under California decisional law CCP Section 583(b) is inapplicable. Karubian, supra, 152 Cal.App.3d at 139.

More importantly, the District Court stated it had no discretion in the matter but to dismiss. California courts, however, look to various factors, including prejudice and the reasonable diligence of plaintiff, before deciding whether CCP Section 583(b) should be applied. These exceptions to CCP Section 583(b) are demonstrated in the facts of this case. Trial on this case would have been held no later than four years after the suit had been commenced but for the delays caused by Whittaker and the

District Court.

Unquestionably, the case could not have come to trial before 1982, as Whittaker's counterclaim was only filed in late 1980. That counterclaim raised substantially new issues in the case requiring respondent to conduct additional discovery which was not accomplished until early 1982, at which time respondent joined in the first motion requesting a pre-trial conference. Whittaker opposed the motion, and filed its first motion to dismiss under Rule 41(b). Whittaker's motion was denied, although the Court did grant Whittaker a postponement of the pre-trial conference so as to enable it to conduct discovery.

In that first motion, Whittaker never asserted the applicability of state procedural rules to a federal diversity action. In fact, when Whittaker sought and was granted a postponement of the

pre-trial conference in order to take discovery, it failed to advise the Court of any pending five-year statute. The only conclusion to be drawn is that Whittaker was either unaware of CCP Section 583(b) or was consciously seeking the postponement with the intent of delaying the case beyond five-years in order to bring the CCP Section 583(b) motion. As Whittaker never initiated the discovery it so feverishly sought to take, it can be forcefully argued that the requested postponement was merely a ruse.

Under California law it would be error to reward Whittaker for such dilatory conduct by applying CCP Section 583(b). Therefore, even in the event CCP Section 583(b) does apply, it was clearly an abuse of discretion for the District Court to fail to exercise its discretion to exempt respondent from dismissal under CCP Section 583(b).

CONCLUSION

In view of the above authorities and analysis, it is respectfully submitted that the court of appeals for the Ninth Circuit Court properly decided the issue and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Orange, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 500 S. Main Street, North Tower, Suite 925, Orange, California 92668; that on December 23, 1985, I served the within Brief in Opposition to Petition for Writ of Certiorari in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Orange, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 1985, at Orange, California.

_____

David P. Christianson